TI HUCK & ANOR. v. MOHAMED YUSOF

[F.C. (Ong C.J., Gill and Ong Hock Sim F.JJ.) April 25, 1973]

[Ipoh — Federal Court Civil Appeal No. 97 of 1972]

Damages — Assessment of damages — Compulsory retirement as result of injury — Whether gratuity and pension should be taken into account — Civil Law Act, 1956, ss. 3(1) and 7.

This was an appeal from the decision of Suffian F.J. (reported in [1973] 1 M.L.J. 48). The respondent, a police constable had been injured in a road accident. He suffered a fracture of the left femur and abrasions. As a result of the injuries he was retired from the police force. Liability was admitted and the only question for determination was the quantum of damages. The learned judge held that in assessing damages for loss of earnings the gratuity and pension received by the respondent should not be brought into account.

Held: (1) the award of $10,000 for pain, suffering and loss of amenities in this case was on the high side and should be reduced to $5,000 which would be more in accord with the discernible pattern in comparable cases;

(2) as the gratuity and pension in this case were non-contributory they should have been taken into account and deducted from the damages awarded.

Cases referred to:-

(1) *Browning* v. *War Office* [1963] 3 All E.R. 1089.

(2) *Parry* v. *Cleaver* [1969] 1 All E.R. 555.

(3) *Raja Mokhtar* v. *Public Trustee* [1970] 2 M.L.J. 151.

(4) *Anna Yong* v. *Government of Sarawak* [1972] 1 M.L.J. 103.

(5) *Parry* v. *Cleaver* [1967] 2 All E.R. 1168.

(6) *Jones* v. *Gleeson* (1965) 39 A.L.J. R. 258.

(7) *Smith* v. *Leech Brain & Co. Ltd.* [1962] 2 Q.B. 415.

(8) *Richardson* v. *Mellish* 2 Bing. 252.

(9) *Re Mirams* [1891] 1 Q.B. 594, 595.

FEDERAL COURT.

V. P. Nathan for the appellants.

G. T. S. Sidhu (Inderjit Singh with him) for the respondent.

Ong C.J. (delivering judgment of the court): This is an appeal against the quantum of damages awarded by the High Court at Raub to a police constable injured in a road accident on August 12, 1968 who, on account of being certified unfit for further constabulary duty, was compulsorily retired from the Police Force on November 1, 1970.

The plaintiff was born on December 31, 1928. He joined the Police Force on August 1, 1952 and had served as police constable for 18 years and 3 months prior to his retirement. During this term of service he was never promoted from the ranks and, had he not been prematurely retired, the learned trial judge found as a fact that his chances of promotion were nil.

His last pay on October 30, 1970 was $270 all in, which was the maximum of the Suffian scale for police constables. Upon his compulsory retirement he could have been granted a pension for life of $886.95 per annum. But he opted to commute a quarter of this, whereupon he was given a lump sum gratuity of $2,771.75 and an annual pension for life of $655.21, or $55.43 per month, under the Pensions Ordinance.

If not injured, he could have worked until the compulsory retirement age of 55, whereupon he would have been entitled to a lump sum gratuity of $4,771.38 and a monthly pension of $94.53 — meanwhile drawing his full pay from November 1, 1970 to December 31, 1983. Such gratuity and pension, as found by the learned trial judge, were *non-contributory*. At the trial of the action evidence was given that, in addition to the pension then being paid to the plaintiff, he was eligible under Pension Regulation 19(1) (L.N.233/1957) to a minimal injury allowance of $202.50 per annum. It was, by consent, disclosed, at the hearing of this appeal, that the plaintiff has in fact been paid such allowance, at the rate of $405 per annum, since the date of judgment herein. Under the circumstances, this benefit had not been taken into account for the reasons stated in the judgment.

Notwithstanding that the pension was non-contributory, the judge took note of the fact that, although pensions are technically *ex-gratia*, the chances of their being cut down or cut off completely by Government are remote. The total award, inclusive of $750 for special damages, amounted to $43,693.55.

The appellants raised three grounds of appeal: (a) that the award of $10,000 for pain and suffering and loss of amenities was excessive and above the discernible trend of the pattern of awards in reasonably comparable cases; (b) that the non-contributory pension, gratuity and injury allowance should have been taken into account in assessing the plaintiff's loss of earnings; and (c) that calculations of the loss of future earnings should have had regard to some degree of earning capacity instead of the same being assessed as nil.

The first ground of appeal poses no real difficulty. The only serious injury sustained by the plaintiff was a fracture of the left femur resulting in the extension at the knee being limited by 5° and flexion of this knee by 30°. Though there was some wastage of the thigh, reducing its girth by about 2 inches, the fracture had satisfactorily united and there was no resultant shortening of the leg nor any injury to the left hip-joint. But, because treatment of the fracture had required immobilisation thereof, there were certain after-effects on the knee, which showed signs of osteoarthritis in the joint. The plaintiff, by reason of being unable to run or walk briskly on account of a limp, was certified permanently *unfit for further duty as a police constable* — but the fact remains that it was not at all a crippling disablement. The award of $10,000 for pain, suffering and loss of amenities, therefore, seems to us rather on the high side. In fact it was over twice the amount of the gratuity he would receive had he served till 55, and almost 25 times the annual injury allowance which he has been paid since the date of the judgment appealed against.

We think $5,000 would have been more in accord with the discernible pattern in comparable cases: see *Rohani, Jim Kam Swee, Mohamed Ariff* and *Phuah Swee Hoe* at pages 500-501 *Mallal's* Digest, Vol. II. We would break up the $5,000 into a moiety for pain and suffering and the other for loss of amenities, having regard to the amount of the all-in global award. The award on this head had necessarily to be itemised, and rightly so; but, while the effect of the injury was only to render the plaintiff incapable of the strenuous physical exertions required of a police constable, it was

far from being a serious disablement which materially interferes with the everyday life of any man who turns to a less vigorous occupation for which his capability remains unimpaired.

We turn now to the more complex problem raised in the other grounds of appeal. Before doing so, we think it is necessary to set out in full so much of the judgment as led to the awards being assessed differently for separate periods of time: it reads: —

"It is common ground that general damages are payable to the plaintiff under two heads:

(a) for loss of future earnings; and

(b) for pain and suffering and loss of amenities.

Loss of earnings.

It is submitted on behalf of the defendants that the gratuity and pension received by the plaintiff from Government should be brought into account in assessing damages for loss of earnings. I have considered all the cases cited, namely, *Browning* v. *War Office;*[1] *Parry* v. *Cleaver,*[2] a House of Lords decision; *Raja Mokhtar*[3] and *Anna Yong;*[4] and have come to the conclusion that the *gratuity and pension received should not be brought into account in assessing the damages* under this head.

In assessing the financial loss suffered by the plaintiff I find it convenient to deal with it in separate periods as was done by Lord Denning M.R. in *Parry's* case in the Court of Appeal.[5]

Period 1.

This is the period from the date of the accident (12th August, 1968) to the date of the trial (5th July, 1972). During this period the plaintiff received his full salary up to 30th October 1970, when he was discharged. So he suffered *no financial loss* in that period, and he claims nothing. Then from 1st November, 1970 to the trial on 5th July, 1972, he suffered loss of $270 per month. As against this, he received a lump sum gratuity of $2,771.75 as well as a monthly pension of $55.43 for the rest of the days. But ignoring these benefits (as I have decided it is proper to do), his loss comes to $5,443.55: this is *actual and constitutes special, not general damage.*

Period 2.

This is the period from the date of the trial (5th July, 1972) to the time when he would have retired from the police at the age of 55 (on 31st December, 1983, as he was born on 31st December 1923, according to Exhibit P1). He suffers loss during this period since he receives no salary at all, but as against this he has received a gratuity and will continue to receive a monthly pension as from the date of his retirement: both *these amounts however have to be ignored,* and so his loss during that period comes to $37,225.16.

Period 3.

This is the period from age 55 (when he would have retired from the police force) till his death at, say, the age of 60. He suffers *no loss of salary during this period,* as he would have had to retire anyhow, but if he had retired at age 55 he would have received a bigger lump sum gratuity and a bigger monthly pension. His loss is therefore the difference between what his gratuity and pension would have been at age 55 if he had not been injured (lump sum of $4,771.38 and monthly $95.43) and the gratuity which in fact he received and the pension which in fact he has received and will continue to receive on earlier discharge at the age of 42 ($2,771.75 and monthly $55.43). Following the House of Lords decision in *Parry's* case, I hold that the *gratuity* he has received *and the monthly pension* which he has been receiving *should be taken into account,* and doing so I find that his loss comes to $4,399.63.

The total for the three periods comes to $47,068.34 as follows —

Period 1 (special damage)	... ...	$ 5,443.55
Period 2 (loss till retirement at age 55)	...	$37,225.16
Period 3 (loss from age 55 until age 60)	...	$ 4.399.63
Total	=	$47,068.34

The last two figures totalling $41,624.79 must be scaled down so as to allow for contingencies (for instance, he might die at an early age owing to extraneous causes altogether; he might be maimed and disabled from work while for instance arresting an armed robber or due to other hazards of his employment; and so forth) and give effect to the fact that payment is made at once, i.e. to reduce them to present value. I would scale them down to $27,500.00.

Pain and suffering and loss of amenities.

Two cases noted in the third edition of Dr. Mallal's Digest, paras. 3652, 3658 were cited on behalf of the plaintiff and it was said that between $12,000 and $15,000 would be a fair award under this head and two cases at paras. 3738 and 3740 were cited on behalf of the defendants and it was said that an award of between $4,000 and $5,000 would be fair. Considering the nature of the injuries suffered and the operations made necessary and the time spent by the plaintiff in hospital (four months) and the permanency of the limp, I consider $10,000 a fair award under this head.

I therefore order the defendants to pay —

(1) special damages (agreed) in respect of the first three items in the Statement of Claim	$	750.00
(2) special damages in respect of actual loss of salary from retirement until date of trial (period 1 above)	$	5,443.55
(3) general damages (periods 2 and 3 above)	$	27,500.00
(4) general damages (pain and suffering, etc.)	$	10,000.00
Total =	$	43,693.55".

It is clear that the learned trial judge in the instant case decided to follow the path recently blazed by another learned judge at first instance in *Raja Mokhtar's* case, where Raja Azlan Shah J. said: —

"Although decisions of Commonwealth Courts are not binding, they are entitled to the highest respect. In my view, it is important that I should apply the principles formulated in *Parry* v. *Cleaver* and *Jones* v. *Gleeson*[6] so that the common law and its development should be homogeneous in the various sections of the Commonwealth: *per* Lord Parker C.J. in *Smith v. Leech Brain & Co. Ltd.*[7] A proposition was put forward on behalf of the defendant in the present case that the only occasion where pensions shall not be taken into account is in an action for death benefits under section 7(3) of the Civil Law Ordinance, 1956, and no other. I think it is only necessary to state the proposition to show that it is utterly unsound. If public policy as enacted in the Civil Law Ordinance requires all pensions to be disregarded in a claim for death benefits, how can it be argued as proper to take pensions into account in assessing damages at common law. If section 7(3) of the Civil Law Ordinance confers an advantage to claimants in respect of pensions rights in actions for death benefits, I do not see any difference that such pensions should not confer an equal benefit to claimants in actions for personal injuries at common law. In my judgment pension rights are *ex gratia* payments made to a government servant in respect of his past conduct and service out of the discretion of the Government and independent of the existence of any right of redress given to him against others.

I am satisfied that the weight of authorities and public policy support my view that pensions are not to be brought into account in assessing damages at common law."

Raja Mokhtar was awarded $110,000 for loss of future earnings, plus $80,000 for pain and suffering, including loss of amenities, and $10,000 agreed special damages, making a total of $200,000. He was holding a high official post as State Secretary, Perak, when, at the age of 41, he suffered very serious spinal injuries in a motor-accident which resulted in total paralysis of the lower half of his body and disablement of ordinary bowel, bladder and sexual functions. After four months

in the General Hospital, he had to proceed to Perth, Australia, for another lengthy course of specialist treatment, followed by yet another long sojourn in the University Hospital — lasting in all over two years. The long and painful courses of hospital treatment, followed by a lifetime of frustrations flowing from loss of vital amenities to a man struck down in his prime, after being used to leading a full and happy married life, must render the present plaintiff's fracture of the femur a trifle by comparison. Raja Mokhtar, moreover, had excellent prospects of promotion, as well as advancement in the private sector after retirement at 50. If the $80,000 for Raja Mokhtar is taken as a yardstick, then the award of $10,000 to the present plaintiff must, in our view, be regarded as excessive and should be reduced, as we have already said, to $5,000.

Again, with reference to Raja Mokhtar, there are certain common factors which render the two cases comparable. The plaintiff in each case was a Government servant granted disablement pension. On his compulsory retirement Raja Mokhtar was given a lump sum gratuity of $28,606 and a yearly pension of $6,867.87, or $572.32 per month. On the present plaintiff's retirement at approximately the same age, he received $2,771.75 as gratuity and a monthly pension of $55.43. The ratio is approximately 10 to 1. If the same standard or principles were to be applied in each case, then, allowing for a margin of a few thousand dollars either way, it seems to us that any award to this plaintiff in excess of, say, $25,000 must be considered unduly excessive. How, then, did it come about that the total award was as high as $43,693.55, with interest at 6 per cent. per annum on some $15,000 thereof? Some effort therefore is called for to reconcile, if possible, the differences between these cases.

Let us say at once that we are wholly in agreement with the quantum of the award to Raja Mokhtar. We bear in mind also that there can be little doubt regarding the defendants' insurers in that case having behaved handsomely in defraying all expenses incurred for treatment in Perth and other out-of-pocket expenses — for which it will be noted that Raja Mokhtar made no claim to reimbursement. If one may hazard a guess, these expenses would be in the region of $50,000. The learned judge undoubtedly had that in mind in arriving at the global figure of $200,000.

But there the point had been raised by defendants' counsel, in mitigation, that damages should be assessed at common law and that, to the extent of the gratuity and pensions receivable, there should be a set-off according to the formula laid down by Diplock L.J. in *Browning* v. *War Office*[1] (page 1095) as —

"the difference between the money which the plaintiff would have received had he been able to continue in the gainful occupation which he would have followed if he had not been physically injured, and the money which he has received or will receive (on the assumption that he has acted or will act reasonably) while his ability to carry on that occupation is extinguished or reduced by his physical injuries".

In the passage quoted earlier, Raja Azlan Shah J. had stated the reasons which led him to hold that gratuities and pensions should not be taken into account. He is a judge of experience whose decisions are generally held in respect. We have therefore considered his judgment with great care, as well as the authorities he cited as carrying decisive weight with him. After some hesitation, we fear we have to voice our dissent. The House of Lords decision in *Parry* v. *Cleaver*,[2] which affirmed in principle the decision of John Stephenson J. at first instance and reversed the unanimous decision of the Court of Appeal, was a majority decision of Lord Reid, Lord Pearce and Lord Wilberforce — Lord Morris of Borth-y-Gest and Lord Pearson dissenting. In sum the final word was that of four judges, against five. The four, however, found support in the decision of the High Court of Australia in *Jones* v. *Gleeson*.[6]

With respect, unlike decisions of the Privy Council, those authorities are not binding on our courts, and it may be observed that the essential difference between them and the instant case is that there the pensions were contributory — that is to say, being paid for during the employee's term of service out of a fraction of his salary — whereas in the instant case the gratuity, pension and disablement allowance were benefits received *gratis*. The distinction is a material one of principle comparable to purchase of insurance. As Lord Reid explained in *Parry* v. *Cleaver*, at page 558: —

"As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should ensure to the benefit of the tortfeasor."

In the next place, the House of Lords' majority decision clearly shows that, to Lord Reid and Lord Pearce at least, public policy did weigh largely in their decision. The same line was adopted by Raja Azlan Shah J. in *Raja Mokhtar's* case. We recall that it had been said in *Richardson* v. *Mellish*[8] that public policy "is a very unruly horse and when once you get astride of it you never know where it will carry you" and Cave J. in *Re Mirams*[9] observed: —

"Judges are more to be trusted as interpreters of the law than as expounders of what is called 'public policy'."

For our part, we think that the question of public policy has no part to play when the court attempts stretching of the common law by extending the interpretation of section 3(1) of the Civil Law Ordinance 1956 beyond limits defined by Parliament. The section reads: —

"3.(1) Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, *the court shall apply the common law of England* and the rules of equity *as administered in England at the date of the coming into force of this Ordinance:*

Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."

Then section 7 goes on to provide expressly for *compensation to be payable to the family of a deceased person for loss occasioned by his death*, subject to the following relevant proviso, namely — that:

"(i) in assessing such damages there *shall not* be taken into

account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the coming into force of this Ordinance;

...

Provided further that in assessing such damages *there shall also not be taken into* account —

(i) any sums payable as a result of the death under section 13 of the Employees Provident Fund Ordinance, 1951;

(ii) *any pension or gratuity, which has been or will or may be paid as a result of the death.*"

In our view the last proviso abovenamed must be construed in its proper context and judges are not at liberty to extend its application, by analogy, to the pension or gratuity which is payable, not to a deceased person's dependants, but to an injured person himself.

The true principle applicable in the assessment of damages at common law, in a few words, is as stated by Lord Denning in *Browning* v. *War Office*[1] that the plaintiff should —

"... give credit for all sums which he receives in diminution of his loss, save in so far as it would not be fair or just to require him to do so."

Thus, contributory pensions would not be deductible, but a non-contributory gratuity or pension should be. On this point we need only quote one sentence from the judgment of Lord Reid, at page 562: —

"... I have already said that *it cannot be right to* bring all pensions receivable as of right into account but to *disregard completely all discretionary pensions*".

In the instant case, the learned trial judge had found and stated as a fact that the possibility of the Government cutting down or cutting off completely the plaintiff's pension (and injury allowance) are inconceivable. Even discretionary pensions, in the view of Lord Reid, cannot be completely disregarded — and his Lordship was there dealing with a case of a contributory pension where there was a clear analogy to insurance. Hence in our view the decision of their Lordships in *Parry* v. *Cleaver* is not an authority relevant to non-contributory pensions. In *Jones* v. *Gleeson*, too, the plaintiff was a contributor to a superannuation fund. With respect, therefore, we think the learned trial judge in the instant case erred in holding that the gratuity and pension were non-deductible. It follows that the injury allowance must be taken into account for the same reason — although it had not entered into the judge's calculation at the time. The notice of appeal filed leaves the question of the entire award at large, and the known fact that payment has been and will be made of $405 for life cannot be ignored in a reassessment by this court of actual financial loss claimed as damages for tort.

We shall now proceed with what we consider to be the proper award to be made for the various periods.

Period 1: From August 12, 1968 to October 30, 1970 the plaintiff suffered no financial loss and claimed nothing. From November 1, 1970 to the date of trial on July 5, 1972 he should have received (if in service) $270 per month or a total of $5,447.50 for 20 months and 5 days; but he received a gratuity of $2,771.75 and pension cum injury allowance of $89.18 per month or $1,783.60 for the same period, making a total of $4,555.35. His actual financial loss, therefore, until date of trial was $892.15, which may be treated, as the judge did, as special damages.

Period 2: This covers the period from date of trial July 5, 1972 till the plaintiff's normal retirement age of 55 on December 31, 1983: for this period of 11½ years (ignoring the 5 days) the plaintiff should receive a total pay, at $270 per month, of $37,260 but his pension and injury allowance amounts to $12,306.84. His financial loss therefore amounts to $24,954, leaving out the fraction of a dollar.

Period 3: This covers the period between his retirement at age 55 and his death at, say, 60. The learned trial judge awarded the plaintiff $4,399.63. For this period, it is true that his gratuity, pension and injury allowance would not equal what he would receive on normal retirement at 55. The gratuity would be $2,000 less than what he was paid in 1970 and the pension of $95.43 is more than the pension cum injury allowance of $89.18 per month by $6.25. This works out at a total loss of $2,375 for this period, making up his total loss for periods 2 and 3 to $27,329.

The trial judge had scaled down his total of $41,624.79 for Periods 2 and 3 to $27,500 by reason of the lump sum payment in advance and other contributory factors. We think a reduction from $27,329 to $20,000 on the same basis would be a fair and reasonable award, if not a generous one. As a police constable, his monthly salary will certainly allow him no savings which can possibly total $10,000, much less $25,000, by December 1983. This sum, invested at 6 per cent. per annum, should fetch him a monthly income of $125 without touching his capital. Were the capital properly invested, say, on the advice of a Bank Bumiputra manager, it may very well be that the accident was a blessing in disguise and investment of this substantial capital sum may transform him into a man of substance by 1983.

In the result we would assess the damages as follows:

(1)	Special damages, as agreed,	$ 750.00
(2)	Special damages till date of trial (Period 1)	$ 892.15
(3)	General damages for loss of earnings after date of trial (Periods 2 & 3)	$20,000.00
(4)	General damages for pain and suffering and loss of amenities	$ 5,000.00
		$26,642.15

We would award interest on the said total sum at 6 per cent. per annum from date of judgment herein till date of satisfaction. The reason we have disallowed interest from the earlier date is that the plaintiff was in receipt of full pay till November 1, 1970 and thereafter in receipt of a gratuity and pension and his financial loss till date of trial was less than $1,000.

It is of particular relevance in this case to note that recently in *Fairley* v. *John Thompson (Design and Contracting Division) Ltd.*, reported in the *Times* on

February 10, 1973, Lord Denning pointed out as follows: —

"It is important to realise that there is a difference between an *award for loss of earnings* and *compensation for loss of earning capacity*. Damages for loss of future earnings are for real assessable loss sufficiently provable by evidence. For loss of *earning capacity* compensation is given by way of general damages".

The instant case is pre-eminently a claim for loss of earnings, readily assessable according to the evidence.

We would allow this appeal, reduce the award of damages to $26,642.15, with interest thereon at 6% per annum from date of judgment in the court below till satisfaction. The $4,500 paid into court by the defendants will be released to the plaintiff's solicitors. As to costs, we think that the best practical solution would be to order that the costs of this appeal be set off against the costs of the action, leaving a balance in favour of the plaintiff, which we would assess at $1,000. The appellants' deposit of $500 will be paid out to the plaintiff's solicitors towards the said sum of $1,000 due as balance of costs after set-off.

Appeal allowed.

Solicitors: *Richard Talalla & Co.; Inderjit Singh.*

AHMAD ISMAIL v. MALAYA MOTOR COMPANY & ANOR.

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F.JJ.)
May 25 1973]
[Kuala Lumpur — Federal Court Civil Appeal No. 119 of 1972]

Hire Purchase — Hire purchase agreement superseding sale by car dealer — Implied term — Anticipatory breach — Seizure of car by police — Hire Purchase Act, 1967, s. 6(1)(b).

The appellant had agreed to buy a secondhand car from the first respondent, a car dealer. The appellant turned in his own car and paid a deposit, promising to pay the balance later. He then arranged with the second respondent, a finance company, for the hire purchase of the car to him. Subsequently the car was detained by the police on suspicion that it had been stolen. The appellant sued both respondents for breach of contract. The claim was dismissed in the Sessions Court and an appeal to the High Court was also dismissed ([1973] 1 M.L.J. 117). The appellant thereupon appealed to the Federal Court.

Held, dismissing the appeal: (1) the sale agreement in this case between the car dealer (first respondent) and the appellant was superseded by the hire purchase agreement and therefore the appellant has no claim against the first respondent;

(2) there was no proof that the seller or owner of the car had no title to the car in this case, as there was only a suspicion that the car had been stolen and the car was in fact eventually returned by the police to the second respondents;

(3) there was no anticipatory breach of contract in this case as there had been no act by the second respondent which made performance of the contract impossible. If performance had been made impossible, it was not because of the act of the second respondent but because of the intervention of the third party, the police.

Cases referred to:-

(1) *Warman* v. *Southern Counties Car Finance Cpn. Ltd.* [1949] 1 All E.R. 711, 714.

(2) *Universal Cargo Carriers* v. *Citati* [1957] 1 All E.R. 70.

(3) *Heyman* v. *Darwins Ltd.* (1942) 1 All E.R. 337, 359.

(4) *Hochster* v. *De La Tour* 118 E.R. 922.

FEDERAL COURT.

Raja Abdul Aziz bin Raja Addruse and *Wan Ariff bin Wan Hamzah* for the appellant.

Tara Singh Sidhu for the first respondent.

Chow Sing Yau for the second respondent.

Suffian F.J. (delivering judgment of the court): On December 18, 1969, the plaintiff (appellant here) decided to buy a secondhand Morris car bearing registration No. BW343 from the first defendant, a car dealer (first respondent) for $4,900. The plaintiff turned in his own car, for which he was given a credit of $1,200. He also paid the first defendant $1,000 cash. He had to find another $2,700. As to this, it was agreed that it should be settled on or before 19th December, 1969, in default of which the deposit of $1,000 cash would be forfeited.

Since the plaintiff had no money to pay for the balance, he was introduced by the car dealer to the second defendant, a finance company (second respondent), as a result of which the plaintiff entered into a hire purchase agreement (Exhibit P3) with the finance company on December 19, under which the finance company was referred to as the "owners" of the Morris car and the plaintiff as the "hirer". Under the agreement the plaintiff was to pay the second defendant monthly instalments of $150 beginning on 19th January, 1970. The plaintiff paid four monthly instalments. He stopped doing so when the car was detained by the police on 30th April, 1970, on suspicion that it had been stolen.

During the course of police investigations the police offered to return the car to the plaintiff subject to conditions. The plaintiff acting on legal advice refused to accept the offer. On 4th July, 1970, the plaintiff through his solicitors terminated the hire purchase agreement by letter (Exhibit P5), the relevant particulars of which read as follows:

"We are instructed that under the abovementioned Hire Purchase Agreement, our client bought by hire purchase one motor vehicle Morris model No. 1000 Registration No. BW343 at a price of $5,820.00. We are further instructed that on the 19th day of December, 1969, our client paid you a deposit of $2,220.00 and that the balance of $3,600.00 was agreed to be paid by 24 instalments of $150.00 per month.

X X X X X

PLEASE TAKE NOTICE we are instructed to and we do hereby terminate the Agreement referred to above by virtue of breach of condition and warranty on your part in that you have no title to the said motor vehicle. The deposit ($2,220.00) and the four months instalments (amounting to $600.00) were paid to you for no consideration. Our client is therefore entitled to a refund of the sum of $2,830.00. Further, as a result of the breach on your part, our client suffered special damages amounting to $350.00. We hereby demand from you the total sum of $3,170.00 payable to our client within 14 days from the date hereof failing which our instruction is to take proceedings against you without further notice."